Office - Supreme Court, U.S.
FILED
NOV 13 1945
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

ELIZABETH ARDEN SALES CORPORATION,
Petitioner and Appellant Below,

v. No. 542

GUS BLASS COMPANY ..... *Respondent and Appellee Below.*

BRIEF OF RESPONDENT

GROVER T. OWENS,
S. LASKER EHRMAN,
Attorneys for Respondent.

INDEX

Page

BRIEF—

I. THE FEDERAL QUESTION INVOLVED IS NOT OF SUFFICIENT IMPORTANCE TO JUSTIFY ISSUANCE OF THE WRIT 1

II. THE DECISION OF THE CIRCUIT COURT OF APPEALS IS CORRECT 2

CASES CITED

Corn Products Refining Co. v. Federal Trade Commission, ... U. S. ....., 65 S. Ct. 961, decided 4/23/45 2

The Matter of Elizabeth Arden, Inc., et al., Docket No. 3133, decided by Federal Trade Commission 10/3/44 1

Federal Trade Commission v. A. E. Staley Manufacturing Co., ... U. S. ....., 65 S. Ct. 971, decided 10/3/44 2

Interstate Circuit v. United States, 306 U. S. 208, 225, and cases cited therein 3

STATUTES CITED

Robinson-Patman Act 1

Subsection (d) of Sec. 2, Clayton Act as amended by Robinson-Patman Act 2

" (e) " " 1, 2

" (f) " " 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

ELIZABETH ARDEN SALES CORPORATION,

Petitioner and Appellant Below,

v. No. 542

GUS BLASS COMPANY ..... *Respondent and Appellee Below.*

BRIEF OF RESPONDENT

I.

THE FEDERAL QUESTION INVOLVED IS NOT OF SUFFICIENT IMPORTANCE TO JUSTIFY ISSUANCE OF THE WRIT.

The question of federal law decided by the Circuit Court of Appeals is not of sufficient importance to justify issuance of the writ. A comparatively small amount of money is involved. The merchandising practice upon which the action was founded has been denounced by the Federal Trade Commission as violating Subsection (e) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

> The Matter of Elizabeth Arden, Inc., *et al.*, Docket No. 3133, decided by the Federal Trade Commission October 3, 1944.

There is no showing that the unlawful practice disclosed by this record is being continued by petitioner or

any other manufacturer or distributor. It cannot be assumed, therefore, that similar cases will arise in the future.

In the period of more than nine years since the Robinson-Patman Act became law no similar action has been brought. We have been unable to find any other reported case of an action by a retailer against a manufacturer or jobber alleging violations of Subsections (d) and (e) of the Act.

The question of federal law involved is not, therefore, an important one at this time. It is not one involving a practice as widespread as the basing point system of freight charges involved in

> *Corn Products Refining Co.* v. *Federal Trade Commission,* ..... U. S. ....., 65 S. Ct. 961, decided April 23, 1945, and
>
> *Federal Trade Commission* v. *A. E. Staley Manufacturing Co.,* ..... U. S. ....., 65 S. Ct. 971, decided April 23, 1945.

This case was not fully developed by petitioner in the district court. Only one witness was produced by it. He was not familiar with petitioner's method of making service allowances.

We assume that the case before the Federal Trade Commission was fully developed. If so, petitioner, by appeal from that order, can present a better record in this court.

II.

THE DECISION OF THE CIRCUIT COURT OF APPEALS IS CORRECT.

We will not burden the court with a lengthy argument on the merits. All the questions raised in petitioner's brief are completely answered in the majority opinion.

The essential facts as to the violation of the Robinson-Patman Act are not undisputed, as stated by petitioner on page 2 of its brief. The petitioner failed to produce any witness familiar with its practices. Petitioner's witness, Brophy, undertook to state its policy of allowing demon-

strators' salaries. On cross-examination, however, he admitted that petitioner made an individual trade with each customer; that he was merely a salesman and knew nothing about how those trades were made (R. 65).

Petitioner did not produce or explain its failure to produce Mr. Joseph A. Danilek, comptroller of the company, Mr. Harry T. Johnson, its general manager at the time the agreement with the respondent was made, Miss Mills, who was sales manager succeeding Mr. Carlson, Mrs. Charles H. Mooney, its present sales manager, or Mr. D. H. Sterling, its assistant sales manager. Mr. Brophy testified that Mr. Carlson was in the army, but no reason was given for petitioner's failure to call the other witnesses or take their depositions (R. 53, 54).

The failure to call a witness raises the presumption that his testimony would be unfavorable.

> *Interstate Circuit* v. *United States*, 306 U. S. 208, 225, and cases cited therein.

The record shows that the respondent had a larger, more modern store than the Cohn Company, in whose favor petitioner discriminated. The discrimination began at the inception of the dealings between the parties. It continued throughout the period under consideration. Petitioner failed to prove that it would have treated respondent with proportionate equality under any circumstances.

The figures on pages 16 and 17 of petitioner's brief are misleading for the following reasons:

1. In the year 1938 they compare respondent's purchases for five months with the Cohn Company's purchases for the entire calendar year. The Cohn Company purchased only $3,834.83 for the period from August 1, 1938, to January 1, 1939.

2. If the calculations had been made on a fiscal year basis, the year August, 1938, to July, 1939, would show: Respondent's purchases, $7,086.86 (R. 42); Cohn Company's purchases, $7,575.82 (R. 69).

3. The figures used could not be determined in advance. The calculations are, therefore, an attempt to justify a pre-existing discrimination.

4. The percentage calculations are based on similarly unfair premises.

It must be remembered that the Cohn Company had handled petitioner's products for years and had an established trade therein. Petitioner's line was new with the respondent. A new purchaser could never claim equality with an old one if discrimination on that ground is justified. The act permits of no such discrimination. It cannot be read into the words "proportionate equality."

The petitioner had a fully advertised and well-known quantity differential. It allowed a discount of 33⅓% plus 5% from its fixed retail price to customers purchasing less than $7,500 per year (Admission of fact 4, R. 7).

Customers of petitioner purchasing more than $7,500 net at retail from petitioner in any calendar year received a discount of 40% from the stated retail price (Admission of fact 5, R. 7).

33⅓% plus 5% is equivalent to 36⅔%. It will thus be seen that an additional discount of 3⅓% was allowed to quantity purchasers.

The basis of justification for the present discrimination has never been disclosed by petitioner. It offered an explanation, but the record shows that the formula suggested was never used by it.

The dissenting judge in the Circuit Court of Appeals argues that the threefold recovery permitted respondent discriminates against the Cohn Company. We submit that his reasoning is fallacious because:

1. The threefold recovery is a penalty. It is intended as a deterrent to violations.

2. The Cohn Company, being a party to the discrimination, is not entitled to ultimate equality. Knowingly to induce or receive a discrimination in price is prohibited by Subsection (f).

We believe the petitioner's arguments on the question of damages are fully answered in the majority opinion of the Circuit Court of Appeals (R. 108-112).

Respectfully submitted,

GROVER T. OWENS,
S. LASKER EHRMAN,
Attorneys for Respondent.